2010

A Final Letter

Allan C. Hutchinson
Osgoode Hall Law School of York University, ahutchinson@osgoode.yorku.ca

Derek Morgan

Source Publication:

The Journal Jurisprudence. Volume 7 (2010), p. 335-348.

A FINAL LETTER

Allan C Hutchinson[1] and Derek Morgan[2]

What a generous invitation! I am delighted to make a small contribution to your symposium. Although I am not as strong or fervent as I once was (and, if truth be told, spend a large part of my energy simply 'raging against the dying light'). I welcome the opportunity to share some of my modest thoughts on the related events and developments in the law of torts generally and accident compensation more specifically of the last quarter century.

Having glanced through the Derek case in the past weeks and annotating it, I returned to re-read the whole – though not in the order in which the judgment was originally drafted and written – on Saturday morning in a more salubrious cafe some mere seven miles removed from Francis Minchella's cafe where the facts of May Donoghue's now notorious case are alleged to have occurred. It took about an hour to read and to annotate sketchily. It reminded me, as it were, that while art may be short, work is long, but that that work is the art of selection as much as of reflection. We judges are engaged in the construction of hard cases and borderline cases, we make them in the way we select and recount salient facts; review and discount 'applicable' norms; and then weave our own legal threads into the garment that we have designed

What did I find there? Three questions, at least; two assumptions, four typos, and one, maybe two, possible mistakes. And, of course, a number of reflections and reservations were prompted.

First, it is hard to believe that twenty-five years have passed since the judgment in the rather run-of-the-mill Derek and Charles v. Anne and Martin. We are all older, but if my own experience is anything to go by, not necessarily any the wiser. Although I have sought to resist the fall-back temptation of the older author, it does seem to me that the truth of Jean-Baptiste Kar's epigram plus ca change, c'est plus ca meme remains more telling than ever. There has been a lot of 'chatter' (judicial and academic), but very little action for the better when it comes to tort law. We are

[1] Distinguished Research Professor, Osgoode Hall School of Law, Osgoode Hall University.
[2] Sometime Professor of Law, The University of Sheffield, and Editor, The Journal of Professional Negligence.

running on the spot, utilising much intellectual effort, but getting nowhere fast. It is not a very edifying condition.

However, I am both delighted and despondent with the knowledge that this judgment of the Canengus Supreme Court has achieved such notoriety that it warrants recollection and even celebration so many years later. The fact that it is used as both fodder for the academic mill and as a teaching tool for young lawyers is both a blight and a blessing. I am genuinely flattered that people think it retains a certain relevance and can still open up readers' eyes to the problems and plights of tort law and common law adjudication generally. However, its continued usage confirms to me that we have not really come very far in the intervening years and made much of a success of addressing, let alone resolving, the problems that pervade both enterprises.

With that said, what can I offer? Having read and re-read that case and the contributions of my colleagues, I was more than slightly embarrassed by the rather self-righteous and almost sanctimonious tone of my own contribution. It would seem that I had a very high opinion of my own importance and clearly thought that I was making a grand gesture that would stir my colleagues, myself and the rest of the legal world to make some significant changes in what they did. This, of course, was a pious hope.

Nevertheless, although suitably chastened by age and further experience, I still hold to much of what I said in my judgment. I might have expressed it in less alienating and slightly more accommodating terms, but I think that my fit of pique likely served some purpose, if only as an outlet for my own sense of disillusionment and felt need to do something. Since then, I have sought in my writings and public actions to remain true to that commitment to making the world and its legal community a better place. That I have not done close to enough or had sufficient impact is something that I have to live with.

Even though a quarter century has passed, how little has changed. The ghosts of poverty are ever-present. Nearly half of all human beings presently live in severe poverty; many of them fall far below that threshold: people of colour, women and the very young are heavily over-represented among the global poor. Almost a billion people are chronically under-nourished and lack access to safe water; more than two billion cannot rely on basic sanitation and essential medicines are out of their reach. Illiteracy is rampant and children are obliged to work as soldiers, prostitutes, or domestic servants. These circumstances are depressing and are getting worse, not better.

What is equally depressing is that extreme forms of poverty exist not only in the Third World, but also in so-called 'advanced' and wealthy societies like Canengus and other similar societies. Nearly one in ten Canengusians experienced conditions of 'absolute poverty' without basic human necessities such as enough food, safe drinking water and proper sanitation. And a similar number live in conditions of relative poverty and deprivation; it is the old, the young, and single parents who carry the heaviest burdens. The gap between the haves and the have-nots continues to grow wider. This is an affront to all decency and an insult to humanity.

I still tend to agree with what John Maynard Keynes (now slightly back in favour after being intellectually exiled by the Chicagoan marketeers) said almost 100 years ago that "we assume some of the most peculiar and temporary of our late advantages as natural, permanent, and to be depended on, and we lay our plans accordingly." Moreover, "on this sandy and false foundation we scheme for social improvement and dress our political platforms, pursue our animosities and particular ambitions." Lawyers, judges and jurists do not seem to appreciate (or simply refuse to accept) that the judgments and processes in the Derek case have built on the same sandy and false foundations. We continue to contribute to that state of affairs if we proceed with mere hand-wringing at these unpardonable facts. It may be that prevailing economic regimes need the poor, but moral communities do not. As stark as it seems, the legal community is contributing to perpetuating this travesty as long as it fails to do something significant and sustained to change things.

Many will find this implied vision of the judges as moral and political activists to be very much beyond the pale. I obviously do not. The voice of the judiciary is moral and political whether it likes it or not. The only choice is about what morality and whose interests it wants to serve. There is no place of neutrality or indifference to stand. Like other political actors, the judges have a singular responsibility to forge a moral identity that is worthy of their power and influence. To do otherwise, as many of my colleagues did in Derek, is to institutionalize Hannah Arendt's notion of the 'banalization of suffering'. It is the privileged position that courts claim in our system of governance that behoves them to assume this crucial role and hold communities up to a better vision of themselves. There can be no more noble or fitting ambition than to defend and promote the values of a common humanity. This applies in the doctrinal details of tort doctrine as much as it does in the grander issues of constitutional politics.

When courts engage in the arena of moral politics, as they must, the questions of boundaries become important; there is a prima facie understandable caution in straying from the High Court to the High Court of Parliament and into the High Street. The currencies of legitimacy and credibility mean that judges cannot afford to be thought of as toxic assets on the ideological balance-sheet of democratic politics. However, the Canengus judiciary seems to have frittered away much of its political capital by granting a much higher credit-rating to the courts in the new moral economy of rights-based adjudication. Like so many other countries, Canengus has adopted a Bill of Rights with all its attendant institutional paraphernalia. That some judges have invested this new capital more keenly or rashly than others should be no surprise; there have always been 'brave souls' and 'timorous spirits'. But even the most bold of judicial spirits has refused to utilise their dubious powers to greet the moral clarion-call of poverty's eradication. If they are to have any chance of gaining the support of their citizens, they must act to enhance the welfare, in its broadest sense, of all those who are presently disempowered and disenfranchised (except in the most formal terms). Judges can only help to make politics safe for democracy by instantiating the kind of civic dialogue and action that is needed. Any other way of proceeding is a betrayal of themselves and the society that they represent. Judges need to reconfigure law so that it sharpens, not dulls the 'conscience' of society, a task I set out to accomplish in my judgment in Derek but lacked, as I now see, the moral will to complete, choosing instead to resign my commission and abandon my responsibility to the wider social interests that I was trying to articulate.

As for academic lawyers, I offer my comments and suggestions with even greater hesitation. I have followed the agonies of legal scholarship from the relative sidelines in the past few decades. The American professor, Bruce Ackerman, famously noted that "philosophy decides cases and hard philosophy at that." This strikes me as both a challenging insight and also a dangerous distraction. It seems to me absolutely correct that it is impossible to resolve difficult cases without some resort to a broader set of principles and values; the idea that judges can get by without appreciating the broader theoretical context in which a case or legal doctrine falls is badly mistaken. The only choice is whether you are to have a genuine and defensible knowledge of what your animating theory is or not. Any craft worth its name has to be guided by some more general vision or ambition of social justice. As that quotable jurist, Karl Llewellyn, opined "technique without ideals is a menace; ideals without technique are a mess." And, I would add, that they are not simply a mess, but also a menace. But, even though a resort

to hard philosophy is inevitable it also self- deluding to think that such theories can relieve judges of the painful burden of choosing. At best, philosophical theories can provide an important context or orientation with which they can frame and answer the problems that cases throw up at them. What they cannot do is to lead from abstract elucidation to practical resolution in one fell swoop. As another American, the inimitable Oliver Wendell Holmes, Jr., said, "general propositions do not decide concrete cases." There are many staging-posts from reflection to decision and so many variables to consider. It is little more than a sleight of the hand to propose or pretend that 'philosophy decides case' of its own exclusive and unaided motion. Judges must be philosophers, but they must also be practical men and women of the world. Like all other realms of human interaction, philosophy is one more venue where vested interests, special affiliations and other local enthusiasms are given universal clothing. Law does not need dogma, philosophical or otherwise, but a more pragmatic sensibility and hands-on bent. If I may so, that is exactly why my former colleagues Justices Mill and Wright went so awry.

One theorist who seems to have grasped this is the prolific scholar, Cass Sunstein. He recognises that the retreat to philosophy will not resolve much. As tort law shows, there are almost as many philosophical theories on offer as there are theorists. So, instead of withdrawing to some lofty aerie of pure philosophy, he recommends that progress can be made if we settle for a more modest climb and occupy a ledge on which those who disagree at a greater height can nonetheless find sufficient commonality closer to the ground. Not surprisingly, this innovation has appealed to common law judges and jurists. These 'incompletely theorized agreements' can afford a temporary relief, but their lasting appeal is more elusive. They tend, if I may mix my metaphors, to fall in that uncomfortable spot between an abstract rock and a practical hard place. It only works when there is already ample uniformity and conformity between the philosophical high-fliers; there is no real space for genuine conflict in this middle-of-the-road ideology. It is a band-aid that does little to heal the real source of conflict.

In the face of these salutary truths, it would seem that judges have little choice but to go on doing what they have always done – trek from one case to another in the hope that they will stumble upon some temporary nostrum that will get them out of the doctrinal binds that they so often find themselves in. And the fact is that this might be the best that we can do. If we look for greater consistency or coherence, we will be forever condemned to the hellish fate of other disappointed or frustrated absolutists. Somewhat

perversely, I now realise that, for all my criticisms of the judicial process and my premature retirement from it, there is no other mode of practice that can do much better than the common law format.

Rather than see the common law as a fixed body of rules and regulations, it is preferable to view it as a living tradition of dispute-resolution. Because law is a social practice and society is in a constant state of agitated movement, the common law is always an organic and hands-on practice that is never the complete or finished article; it is always situated inside and within, not outside and beyond, the society in which it arises. In short, the common law is or should be a work-in-progress -- evanescent, dynamic, messy, productive, tantalizing and bottom-up. The common law is always moving, but never arriving, is always on the road to somewhere, but never getting anywhere in particular, and is rarely more than the sum of its parts and often much less. And judges play the role of its itinerant travelers-cum-guides. But – and this is a very large 'but' – this is not to be taken as a complete or uncritical vindication of the status quo. Much less is it a recantation of my earlier criticisms. Far from it. If we are to make good on this depiction of the common law, we must appoint men and women who understand this and who bring to it a wealth of not only legal experience, but also social sensitivity and political insight. [The great judge is not someone who knows more about law than anyone else. Not only do we need judges who are humble and honourable, but also those who are committed to advancing a set of values that are compatible with the best traditions of a truly human and humane society. A great judge should be acclaimed because of their values, not in spite of them. The difficulty comes of course when we come to address what those values are and how they compete one with the other, or one set of values with another set. There is a powerful illustration of the irresolvable difficulties that competing moral and philosophical values pose for common law adjudication in the recent High Court of Australia litigation of Cattanch and Harriton, cases involving so-called 'wrongful life' actions

Actions for wrongful life, as they have come unfortunately to be styled encompass various types of claim. These include claims for alleged negligence after conception, those based on negligent advice or diagnosis prior to conception concerning possible effects of treatment given to the child's mother, contraception or sterilisation, or genetic disability. This distinguishes such claims from those for so called wrongful birth, which are claims by parents for the cost of raising either a healthy or a disabled child where the unplanned birth imposes costs on the parents as a result of clinical negligence. Two of the more controversial cases to have reached the High

Court in the past decade are Cattanach v Melchior where the Court, by a narrow majority (McHugh, Gummow, Kirby and Callinan JJ; Gleeson CJ, Hayne and Heydon dissenting) acknowledged recovery for wrongful birth. In the second joined appeals of Harriton v Stephens and Waller v James; Waller v Hoolahan the Court overwhelmingly precluded a 'wrongful life' claim (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ; Kirby J dissenting). Both cases raised issues around the sanctity and value of life and the nature of harm and the assessment of damages, Harriton and Waller both involve three questions. First, how is the loss in a 'wrongful life' case to be characterised? Is the 'loss' indeed properly regarded as 'life'? Second, once that loss has been characterised, does legal principle or public policy permit recovery? Third, if principle or policy permit recovery, is that loss capable of being ascertained. Of course, these three questions are not considered in isolation from each other – for example, the characterisation of the loss and the views on public policy are obviously interlinked. In Harriton, Crennan J, giving the leading judgment, emphasises the need to preserve the coherence of legal principles ironically using aspects of policy to do so.

In Cattanach, McHugh and Gummow JJ observed that the law should not shield the appellant doctor or hospital from 'what otherwise is a head of damages recoverable in negligence under general and unchallenged principles' for what was a breach of duty of care by Dr Cattanach. They argued that what was wrongful was not the birth of the child but the negligence of Dr Cattanach. Hence, as future expense was a reasonably foreseeable loss, albeit financial, it was recoverable. A similar view was also taken by Justice Kirby. Justice Hayne in dissent acknowledged that financial expenses associated with a child were reasonably foreseeable, but rejected any notion that this automatically entitled parents to recover, arguing that it was against public policy to encourage parents to assert that their child represented a net burden. Justice Heydon also appealed to public policy considerations; child-rearing costs should not be recoverable as this would transform children into objects and create a 'commodification' of life. Chief-Justice Gleeson appealed to international instruments protecting the rights of the child to support this same conclusion while Justice Heydon believed such 'commodification' would be contrary to human dignity.

In a phrase that was later to be reflected on in Harriton and Waller at greater length, responding to the appellant's argument that it was wrong to try to place a value on human life 'because it is invaluable – incapable of effective or useful valuation' - McHugh and Gummow replied that it would be wrong

– simple but wrong – to call upon values such as the importance of respecting human life to conclude that that should shield the appellants from the full consequences in law of Dr Cattanach's negligence. Similarly, it was inappropriate to require set off of the benefits that the Melchior's could be expected to enjoy from the birth and development of the child, as the financial damage directly consequent upon damage to the physical interests of Mrs Melchior were an unrelated head of damage. The Court had been urged to follow a distributive justice approach that requires a focus on the just distribution of burdens and losses among society, as held in the English House of Lords decision in McFarlane v Tayside Hospital Board. There Lord Steyn had argued that 'tort law is a mosaic in which principles of corrective justice and distributive justice are interwoven and in situations of uncertainty and difficulty a choice has to be made between the two approaches.' In Cattanach the High Court narrowly settled on the corrective justice approach, without recourse to subjective judicial notions of community conscience. The community conscience has spoken loudly since however, as, responding to political lobbying from the powerful medical professional organisations in Australia, each state jurisdiction has passed legislation reversing the effect of the High Court's decision.

Harriton and the conjoined case of Waller involved claims for so-called 'wrongful life,' previously derided in a leading English case as entailing the conclusion that 'to impose such a duty towards the child would, ... make a further inroad on the sanctity of human life which would be contrary to public policy.' Alexis Harriton was born 25 years ago with severe physical and intellectual disabilities; she is blind, deaf, has mental retardation and physical disability. She is unable to care for herself and will require continuous care for the rest of her life. She argued that all this could have been avoided or averted if her mother, who had rubella during the first trimester of pregnancy, had been properly advised, which it was accepted that she was not, thus allowing her lawfully to terminate the pregnancy. The doctor's failure to order a second blood test on the appellant's mother led him wrongly to advise that the illness with which she had been suffering had not been rubella.

Keeden Waller (K), on the other hand, was born following his parents use of IVF. Mr Waller had a low sperm count and poor motility; examination disclosed that he also suffered from a blood disorder known as anti-thrombin or Factor III deficiency, the effect of which is to raise the likelihood that blood will clot in the arteries and veins. It was agreed that had the Waller's been told – which they were not – that the AT3 deficiency

was genetic they would have either deferred undergoing insemination until methods were available to ensure only unaffected embryos were transferred, or used donor sperm or terminated an affected pregnancy, such as K's Soon after birth K was diagnosed as suffering from a cerebral thrombosis as a result of which he suffers permanent brain damage, cerebral palsy and uncontrolled seizures. He sued the IVF practitioner, the diagnostic service that analysed K's father's sperm and a specialist obstetrician to whom K's mother was referred after embryo transfer for antenatal care arguing in each case that, but for the negligence of the defendants [comma here] he would not have been born suffering with disability. The High Court finally dismissed both claims and in each case both cases by a majority verdict 6 -1. Justice Crennan, in Harriton and Waller, wrote the leading judgment; Kirby J was the sole dissentient in both appeals. Crennan J (with whom Gleeson CJ, Gummow and Heydon J agreed in both cases) advised that the two main issues in H's appeal were whether there was legally cognizable damage and secondly whether there was a relevant duty of care. Even if both these questions were answered affirmatively, she would have apparently denied the suit 'if calculating damages according to the compensatory principles was virtually impossible ... .' Crennan J observed that to superimpose a further duty of care on a doctor to a foetus (when born) to advise the mother so that she can terminate a pregnancy in the interest of the foetus in not being born, (which may or may not be compatible with the same doctor's duty of care to the mother in respect of her interests), has the capacity to introduce conflict, even incoherence, into the body of relevant legal principle.

Kirby J in contrast contended that what is involved is an "unremarkable" case of a medical practitioner's duty to observe proper standards of care when the plaintiff was clearly within his contemplation as a fetus, *in utero*, of a patient seeking his advice and care. He cautioned against the use of the 'emotive slogan' of 'wrongful life' and, as he sees it, the importation of 'contestable religious or moral postulates.' The reality of the 'wrongful life' concept is such that a plaintiff both exists and suffers, due to the negligence of others. A further disagreement coloured the approaches to the question: 'what is the damage in a 'wrongful life' suit'? According to Hayne J the relevant question, and problem, is that in order for the appellant's life to be viewed as an "injury" or "harm", 'it is logically necessary to compare her life with another person' and not, as she had contended with not having been born at all. 'It is because the appellant cannot ever have had and could never have had a life free from the disabilities that she has that the particular and individual comparison required by the law's conception of "damage" cannot be made.' Crennan J suggests that the appellant's argument that her life with

disabilities is actionable clashes with arguments about the value (or sanctity) of human life and evoke 'repugnance.' It is 'odious and repugnant' to devalue the life of a disabled person by suggesting that such a person would have been better off not to have been born into a life with disabilities But this is to mischaracterise the debate. The plaintiff in a wrongful life action does not maintain that his or her existence is wrongful. Nor does the plaintiff contend that his or her life should be terminated. Rather, the "wrong" alleged is the negligence of the defendant that has directly resulted in the present suffering.

This much seems to be at the heart of the acknowledgement by McHugh and Gummow in Cattanach that what was wrongful was not the birth of the child but the negligence of Dr Cattanach. As alternatively expressed in Waller, "'wrongful life" actions do not literally involve the complaint that life per se is wrongful. As in everyday personal injury actions, the complaint rather is that particular suffering and loss caused by the tortfeasor is legally wrongful. As Tony Weir has nicely expressed it; to damage is not always to make worse in the law of tort; '… it can consist of not making things better when there was a duty to do so.' The fact that the doctor did not cause the rubella damage does not mean that he did not cause the plaintiff to suffer under the rubella damage. What is 'wrongful' is not the life but the life of foreseeable suffering in the event of breach of a duty of care. This is not a wrong with no name; it is a wrong with the wrong name.

The legal action is a limited exercise constructed only in order to attempt to recover damages to support the life that is now being lived, one which, as described, involves total dependence and continuing care, a life of suffering. This case is, evidently, as with many torts cases, about other and wider issues than the presenting issue; it is about who cares, literally and metaphorically, for Alexia Harriton. 'It is hard to see, as Justice Kirby puts it, how an award of damages to a severely handicapped or suffering child would 'disavow' the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society. The hope expressed in the majority judgments is that that will be done by or provided for by the state, rather than the insurance company standing behind Dr Stephens. Yet daily, we read of the general reluctance of all publics to pay for state of the art treatment and care for those who really need it; in terms of health care dollars, we want more and more for less and less. In everyday life there are those who live – literally and metaphorically – on the edges of existence. In this world, the Alexia Harriton's of our societies are likely to be towards the back of a very long queue. That is not,

of course, the same as saying that they should be at the head of it. But the metaphysical argument that the High Court constructs and then eschews (life v non existence) are no more than a convenient screen deflecting away from the core issue; should an admittedly negligent insured doctor's insurers be asked to absorb the costs of the long term consequences of the negligence, or should that be left either to general taxation or the private and philanthropic interest of the appellant's family and friends?

In Waller Crennan J (with whom Gleeson CJ, Gummow and Heydon JJ again agreed) averred that the plaintiff alleged that the defendants caused or materially caused his life with disabilities, flowing from the implantation of the embryo 'which became him,' by failing to investigate and advise his parents that the AT3 deficiency was liable to be transmitted to offspring. It was agreed that such advice would have enabled the parents to make lawful decisions about starting or continuing the pregnancy which would have resulted in K not being born. According to Crennan J the claims involved an assertion that it would have been better if he had not been born, 'irrespective of whether the conduct about which he complains occurred prior to, or during, his mother's pregnancy with him.' That this is not legally cognisable damage, was held in Harriton. Justice Hayne (concurring) said that there was no relevant damage and Callinan J added that Waller (like Harriton) 'cannot be heard as a matter of logic, to say that he "should never have been brought into existence", in which event he would not have been able to say anything at all.'

Again Justice Kirby was straightforward in his explication of the relevant law: 'the established duty of care which health care providers owe to the unborn in respect of pre-natal injuries requires the exercise of reasonable care in investigating risks of disability that might afflict prospective children and warning those in relevant relationships with the provider of such risks.' K was 'unquestionably foreseeable' and vulnerable to the consequences of the defendant's negligence. The first and second respondent 'enjoyed special control' over the circumstances that occasioned the damage caused. And none of the public policy arguments 'furnishes a convincing reason for refusing to provide relief for which ordinary negligence doctrine would otherwise provide.' The strongest argument against recognising a duty or imposing liability if it were breached, Kirby acknowledged, is that comparing existence with non-existence is an impossible exercise because it would involve unknowables or immeasurables, incommensurables as it were. But as Kirby objects in both Harriton and Waller 'these cases demonstrate that this is not so.'

From Cattanach, Harriton and Waller we learn that while birth is not always a blessing for those caring for the born, life is always a boon for the person living it, irrespective of the cost or burden of that life to or on others. There is something in these cases – especially Waller and Harriton – that discloses much about the nature of common law adjudication, and, incidentally, of modern medicine. In applying what he calls the ordinary principles of the law of negligence to Waller, Kirby J comes closest to an appreciation that IVF and its associated genetic technologies are part of an industry – a very particular and special industry to be sure – that operates on commercial lines. And that industry is heavily backed by insurance and services for which consumers are willing to pay. For some, that might in itself be thought to be a cognisable moral objection to the practices of IVF and genetics; that increasingly it looks like the child is being treated in some way as a commodity (not just as a means to another's ends in the Kantian formulation – at least no more than any child may be when conceived) IVF may itself be a part – a large part – of the commodification of the child, but a child who is no less loved and valued by its parents when it is a member of their family. In other words the commodification or commercialisation of part of the process of conception does not deleteriously affect the child after its birth. In the same way in the 'wrongful life' cases, the reality of a case such as this is that the wrongful life action like that of wrongful birth 'are about money rather than love or family feelings.' And, the High Court has held, there is no ground for believing that upholding a claim for damages following the birth of a healthy but originally unwanted child is likely to do any more to commodify that child as a matter of law rather than unwarranted social sentiment (or values) that the Court was not prepared to admit to the bar. Strange then, that it does precisely that in Harriton and Waller, relying on the emotional linguistic appeal of the notion of wrongful 'life' rather than as Kirby suggests the less negatively valued - laden (but not value free) notion of 'wrongful suffering.' In the first case the damages are awarded for the unlooked for expense of damage flowing directly from the physical harm to the mother in the unwanted pregnancy and childbirth, a fact virtually indistinguishable from the real harm in Harriton.

The changing catalogue of the doctrine of sanctity of life in the library of the common law, holds now that it should be shelved below other valuable principles, notably autonomy and in some libraries human dignity. This fundamental shift is a steady and growing if sometimes reluctant acceptance that life may be sometimes more of a burden than a benefit. This has found notable judicial expression in the past two decades in cases such as those involving the dying of patients in persistent vegetative state, of the

withholding or withdrawal of treatment from severely disabled adults and neonates and from the terminally ill, and of the judicial authorisation of operations when the known or sometimes intended result is that one person will die, as in the sanction of operations on conjoined twins. These legal confrontations of the endings of life, notably in England & Wales in the case of Airedale NHS Trust v Bland (1993), are almost paradigm cases of the incommensurability of values. Each evidences a radical rethinking of the doctrine of the sanctity of life in modern law, and is one of the most significant shifts in the common law for centuries, if not, arguably, ever.

Whatever its rhetoric, however, the common law has never in fact been umbilically joined to the sanctity of life doctrine. The tort law system itself is one of regulating risk; certain activities entail risks that may be outweighed by the benefits resulting from them to the community as a whole. 'It is no less plausible to assert that rather than treating life as sacrosanct, the courts are inexorably involved in a system which cheapens life by exposing some lives to threat for comparatively trivial rewards for other people.' As Guido Calabresi has taught, the law of torts entails choices in everyday life. Cases at the edges of existence are sometimes thought to demand as much judicial precision as achievable in the controversy at bar, yet they disclose some of the fundamental values at stake in a legal system. It is unsatisfactory, then, to approach these cases as an exercise in misreading based on mislabelling.

So, in closing, I thank you for presenting me with this opportunity to share these few thoughts with you. In particular, I offer my apology for not having conveyed to you a more enlightening and compelling set of insights. However, I see little that gives me any great optimism that the next twenty-five years will be much different than the previous twenty-five years. As the English causation cases of Hotson, and others, show, the judges still put abstract principle above social justice – it is a sad and wasteful process. Hotson tells us much that we need to know about the common law: principle is prioritised, but there is no escape from politics; indeed the invocation of principle impedes social progress and serves sectional interests. We will continue to make our way through the fog that rolls in from the shores of the future. At a minimum, it is our judicial duty to ensure that we do not add to that murkiness with intellectual smog of our own making.

I ended my judgment in Derek with a few words from John Donne. I will close now, if I may, with the more daunting words of James Fitzjames

Stephen. The tone is more gloomy and downbeat, but no less compelling for that:

"We stand on a mountain pass in the midst of whirling snow and blinding mist, through which we get glimpses now and then of paths which may be deceptive. If we stand still, we shall be frozen to death. If we take the wrong road, we shall be dashed to pieces. We do not certainly know whether there is any right one. What must we do? 'Be strong and of a good courage.' Act for the best, hope for the best, and take what comes. Above all, let us dream no dreams, and tell no lies, but go our way, wherever it may lead, with our eyes open and our heads erect."

Yours truly,

Derall Leftt

References

B Ackerman, Private Property and the Constitution, (1977) at 5
C Sunstein, 'Incompletely Theorised Agreements,' 108 Harvard Law Review 1733(1995)
International Covenant on Civil and Political Rights 1966, arts 23 and 24. International Covenant on Economic, Social and Cultural Rights 1966, art 10. Convention on the Rights of the Child, 1989, art 18.
Cattanach v Melchior (2003) 77 ALJR 1312,
MacFarlane v Tayside Health Board [2000] 2 AC 59
Curlender v Bio-Science Laboratories 165 Cal Rptr 477 at 488 (1980) per Jefferson PJ
G Calabresi, 'The Law of Torts and the Evil Deity' in, Ideas, Beliefs, Attitudes, Values and the Law, (1985) at 1
Harriton v Stephens [2006] HCA 15
Waller v James; Waller v Hoolahan [2006] HCA 16
J M Keynes, The Economic Consequences of Peace, (1919) at 1
K Llewellyn, 'On What Is Wrong With So-Called Legal Education' 35 Colum. L. Rev. 651, 662 (1935).
Justice Holmes, Lochner v. New York, 198 U.S. 45 (1905) (in dissent)
J F Stevens, Liberty, Equality, Fraternity, (1873)
Hotson v East Berkshire HA [1987] AC 750